

REMARKS

This is a full and timely response to the outstanding non-final Office Action mailed September 21, 2006. Upon entry of the amendments in this response, claims 2, 4, and 8 are canceled. Applicant has amended claims 1, 3, and 7. Claims 11-13 are new. Claims 1, 3, 5-7, and 9-13 remain pending. Reconsideration and allowance of the application and presently pending claims are respectfully requested.

Double-Patenting Rejection

The Office Action indicates that claims 1 - 10 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 2-5 and 12-13 of U.S. Application Number 11/037,994.

In this regard, Applicant acknowledges the rejection. However, due to the provisional nature of the rejection, no further action is warranted at this time.

Rejections Under 35 U.S.C. §103

The Office Action indicates that claims 1 - 5 and 7 - 10 stand rejected under 35 U.S.C. §103(a) as being unpatentable over *Zdeblick et al.* ("*Zdeblick*," U.S. Patent No. 6,695,851) in view of *Green et al.* ("*Green*," U.S. Patent No. 6,332,886). The Office Action indicates that claim 6 stands rejected under 35 U.S.C. §103(a) as being unpatentable over *Zdeblick* in view of *Green* and in further view of *Goble et al.* ("*Goble*," U.S. Patent No. 6,565,605). Applicant respectfully traverses these rejections, and considers some rejections moot by claim amendments as detailed further below.

Applicant respectfully traverses the rejections by amending claim 1. The amendments are supported by FIG. 3 and the disclosure in page 4, lines 10-21 of the present application.

No new matter has been added. In this regard, Applicant has amended claim 1 to recite (emphasis added):

1. A facet fusion system for fusing a facet joint comprising:
 - a trochar arranged and configured for use during percutaneous retraction;
 - a retractor arranged and configured for use during percutaneous retraction; and
 - a facet bur arranged and configured for decorticating the facet joint, said facet bur comprising:
 - a shaft being adapted releasably to engage a power source for rotation;and
 - a head having a planar and an extension extending from said planar;***
 - wherein said planar extends laterally outward from a longitudinal axis of said head;***
 - wherein said shaft extends from said planar of said head and extends from said planar in a direction opposing said extension of said head;***
 - wherein said extension is tapered to engage a facet joint to taper said facet joint and said planar has an abrasive surface to engage and plane a posterior surface of the facet joint while the extension is inserted into the facet joint;***
 - wherein said trochar, said retractor, and said facet bur are implemented to prepare the facet joint for fusion.

Applicant respectfully submits that the cited references fail to disclose, teach, or suggest at least the above emphasized claim elements.

The Advisory Action alleges in *Zdebllick*:

... in Figure 11b that the body of the drill (planar) has an extension (end of the drill that has a smaller diameter) that is capable of "tapering said facet joint"...

Applicant respectfully disagrees. Referring to Figure 11b, Applicant fails to see any feature of the drill in Figure 11b, or in any other portion of *Zdebllick*, that ***"is tapered to engage a facet joint to taper said facet joint."*** Rather, it appears that the drill extension disclosed in *Zdebllick* is in fact of uniform diameter. Thus, it is not tapered, and cannot taper said facet joint.

Additionally, Applicant respectfully submits that *Zdebllick* fails to disclose, teach, or suggest a facet bur comprising "a head having a planar and an extension extending from said

planar. . **wherein said planar has an abrasive surface to engage and plane a posterior surface of the facet joint while the extension is inserted into the facet joint;**" as recited in claim 1.

Rather, *Zdeblick* (Col. 11, ln. 13-19) recites:

In the second step, shown in FIG. 11(b), an outer sleeve 76 is disposed about the disc space. The outer sleeve 76 can be configured to positively engage the anterior aspect of the vertebral bodies to firmly, but temporarily, anchor the outer sleeve 76 in position. In essence, this outer sleeve 76 operates as a working channel for this approach. In the step of FIG. 11(b), a drill 77 of known [sic] design is extended through the outer sleeve and used to drill out circular openings in the adjacent vertebral bodies.

Applicant respectfully submits that *Zdeblick* does not in FIG. 11(b) nor anywhere else disclose, teach, or suggest the claimed feature of "said planar has an abrasive surface to engage and plane a posterior surface of the facet joint while the extension is inserted into the facet joint."

In particular, Applicant respectfully asserts that *Zdeblick* does not teach or otherwise disclose at least the features/limitations emphasized above in claim 1. That is, *Zdeblick* does not disclose in any respect:

a head having a planar and an extension extending from said planar;
wherein said planar extends laterally outward from a longitudinal axis of said head;
wherein said shaft extends from said planar of said head and extends from said planar in a direction opposing said extension of said head;
wherein said extension is tapered to engage a facet joint to taper said facet joint and said planar has an abrasive surface to engage and plane a posterior surface of the facet joint while the extension is inserted into the facet joint;

as recited in claim 1. Additionally, *Green* does not remedy this deficiency.

Therefore, Applicant respectfully asserts that claim 1 is allowable over *Zdeblick* in view of *Green* and is in condition for allowance. Since claims 3 and 5 are dependent claims that incorporate all the features/limitations of claim 1, Applicant respectfully asserts that claims 3 and 5 are also in condition for allowance.

Claim 7 is also amended by adding the same features/limitations in claim 1. It is therefore believed that claim 7 is also substantially different from *Zdeblick* and is in condition for allowance. Since claims 9-10 are dependent claims that incorporate all the features/ limitations of claim 7, Applicant respectfully asserts that claims 9-10 are also in condition for allowance. Additionally, claims 9-10 recite other features/limitations that can serve as an independent basis for patentability.

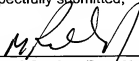
Reconsideration of the rejections of claims 1,3,5,7, and 9-10 is hereby requested.

Applicants submit that as provided above, independent claim 1 is allowable over *Zdeblick* in view of *Green*. Applicants respectfully submit that *Goble* does not remedy the above-described deficiencies of *Zdeblick* in view of *Green*. Thus, for at least the reason that dependent claim 6, incorporates the features of respective allowable claim 1, dependent claim 6 is allowable as a matter of law. Accordingly, Applicants respectfully request that the rejection to dependent claim 6 be withdrawn.

CONCLUSION

Favorable consideration and allowance of the present application and all pending claims are hereby courteously requested. If, in the opinion of the Examiner, a telephonic conference would expedite the examination of this matter, the Examiner is invited to call the undersigned attorney at (770) 933-9500.

Respectfully submitted,



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